

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

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FILE: B-182356

DATE: August 4, 1975

MATTER OF: Government of the District of Columbia
Request for advance decision

DIGEST:

1. Failure of bidder to furnish information certifying product compliance with specifications may be waived as minor informality pursuant to § 2620.14 of District of Columbia Material Management Manual, part I, where, as here (1) specifications are sufficiently detailed to make information called for unnecessary; and (2) IFB failed to clearly establish in detail the requirement for information and purpose to be served thereby, both bases rendering requirement unnecessary and unenforceable.
2. Where IFB does not contain subcontractor or equipment supplier list there exists no basis to reject any bid for failing to properly identify subcontractors or suppliers used in compilation of bid or to be used in performance of contract, notwithstanding that bidders may have opportunity to "bid shop" after award is made.

The Engineering and Construction Administration, Department of Environmental Services, Government of the District of Columbia, by letter dated May 15, 1975, requested an advance decision as to whether an award to Blake Construction Company, Inc. (Blake), may be made given the following circumstances.

On August 22, 1974, invitation for bids (IFB) No. 0247-AA-02-0-5-LA was issued for the construction of nitrification reactor facilities. Bids for the project were opened on May 8, 1975, with nine bidders responding. The apparent low bid was submitted by Blake. The apparent second low bidder, The George Hyman Construction Company (Hyman), has protested to the District of Columbia that award not be made to Blake due to Blake's failure to submit information allegedly required by the IFB.

Hyman's protest is based upon its interpretation of the requirement set forth on page 9 of addendum No. 1 concerning the Motor Control Centers, which stated:

"8. each Bidder shall submit to the District with his Bid, information to show product compliance with the construction details required in this specification."

This requirement was further clarified on page 11 of addendum No. 3, item 16, as follows:

"QUESTION: Subsection I.A.8. was added to SECTION 16I, MOTOR CONTROL CENTERS, by Addendum No. 1. Will a letter of certification by an equipment manufacturer stating that his product will comply with the specifications (with deviations if necessary) suffice to satisfy the requirements of the above referenced paragraph?

"ANSWER: A certification by an equipment supplier will satisfy the requirements if no deviations are made. If deviations are made, all pertinent information must be submitted to satisfy the requirements of subsection I.A.8."

Counsel, on behalf of Hyman, contends that the informational requirement quoted above established a descriptive data requirement in the solicitation. Counsel argues that Blake's bid should be rejected as nonresponsive for failure to submit the requisite information and further argues that Blake has obtained a significant bidding advantage by not binding itself to a particular equipment supplier.

For the reasons that follow, Hyman's protest must be denied.

It appears that the contracting officer has determined that the specifications relating to the Motor Control Centers were sufficiently detailed as to what was required and, therefore, proposes to waive Blake's failure to comply with the requirement for information showing compliance with the construction details as a minor informality under the District of Columbia Material Management Manual, part I, section 2620.14. That section reads as follows:

"MINOR INFORMALITIES OR IRREGULARITIES

"A. Definition

"A contracting officer shall either give a bidder an opportunity to correct any minor informalities or irregularities in the bid or he may waive them if it is to the District's advantage to do so. A minor informality or irregularity is one which does not go

to the substance of the bid (quality, quantity, or delivery) and has no effect on the price. However, the correction or waiver of such an informality or irregularity cannot be made if it will be prejudicial to other bidders."

Hyman protests the action proposed by the contracting officer on the basis that the provision in question imposes a mandatory requirement on all bidders. Moreover, it is argued that if Blake's bid is not rejected as nonresponsive, Blake, unlike bidders who complied with the requirement, will not be tied to one supplier. Therefore, Blake, unlike other bidders, will be able to "bid shop" among subcontractors and manufacturers.

In our opinion, a bidder, by signing the bid form, agrees to and binds himself to perform the work in accordance with attached and referenced specifications, schedules, drawings and conditions. Therefore, a further general certification that the bidder will comply with the specifications adds nothing to his bid and is redundant. B-174347, November 17, 1971. Moreover, as in B-174347, supra, the requirement here for information is so generally stated as to give the bidders little or no indication of what is necessary to comply with the requirement. The solicitation at hand does not contain any justification for the inclusion of the requirement on page 9 of addendum No. 1. To our Office, it appears that this requirement is merely informational and should be construed as solely for the protection of the interests of the Government. In this regard, our Office has stated in 52 Comp. Gen. 190 (1972), citing 40 Comp. Gen. 321 (1960), that:

"Whether certain provisions of an invitation for bids are to be considered mandatory or discretionary depends upon the materiality of such provisions and whether they were inserted for the protection of the interests of the Government or for the protection of the rights of bidders. Under an advertised procurement all qualified bidders must be given an equal opportunity to submit bids which are based upon the same specifications, and to have such bids evaluated on the same basis. To the extent that waiver of the provisions of an invitation for bids might result in failure of one or more bidders to attain the equal opportunity to compete on a common basis with other bidders, such provision must be considered mandatory. However, the concept of formally advertised procurement, insofar as it relates to the submission and

evaluation of bids, goes no further than to guarantee equal opportunity to compete and equal treatment in the evaluation of bids. It does not confer upon bidders any right to insist upon the enforcement of provisions in an invitation, the waiver of which would not result in an unfair competitive advantage to other bidders by permitting a method of contract performance different from that contemplated by the invitation or by permitting the bid price to be evaluated upon a basis not common to all bids. Such provisions must therefore be construed to be solely for the protection of the interests of the Government and their enforcement or waiver can have no effect upon the rights of bidders to which the rules and principles applicable to formal advertising are directed. To this end, the decisions of this Office have consistently held that where deviations from, or failures to comply with, the provisions of an invitation do not affect the bid price upon which a contract would be based or the quantity or quality of the work required of the bidder in the event he is awarded a contract, a failure to enforce such provision will not infringe upon the rights of other bidders and the failure of a bidder to comply with the provision may be considered as a minor deviation which can be waived and the bid considered responsive."

Where, as here, the specifications are sufficiently detailed as to make the information called for unnecessary, the requirement in the solicitation for such information is not enforceable. 49 Comp. Gen. 398 (1969). And even where the information is needed to determine precisely the performance which the bidder would bind himself to undertake, the information requirement must clearly establish in some detail the requirement for information and the purpose intended to be served thereby. 46 Comp. Gen. 1 (1966). We find that the information requirement in this instance fails on both counts.

As concerns the contention of Hyman's counsel that Blake is not bound to one supplier and may, therefore, indulge in "bid shopping," we find this position to be without merit. There is no indication in the record before us that a listing of subcontractors or equipment suppliers was necessary; in fact, the "EQUIPMENT SUPPLIERS LIST" was deleted from the IFB during the course of the procurement. We do not believe that such listing requirements can be deemed part of the IFB, noncompliance with which causes rejection of a bid as nonresponsive, unless the bidders are specifically put on notice in the IFB of the requirements. See 36 Comp. Gen. 380 (1956); 47 id.

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682 (1968); 48 id. 171 (1968); 51 id. 403, 407 (1972); DPF Incorporated, B-180292, September 12, 1974. Bidders cannot be expected under these circumstances to be aware of the contracting officer's discretionary determination regarding the inclusion of such listing requirements except from perusing the IFB itself, nor can they compete on an equal basis unless they know in advance the basis on which their bids will be evaluated. See 36 Comp. Gen., supra; 48 Comp. Gen. 326 (1968).

No clause requiring a listing of subcontractors or equipment suppliers was either specifically set forth or incorporated by reference in the IFB. We believe that under these circumstances there would be no basis to reject any bid for failing to properly identify subcontractors or suppliers used in the compilation of the bid, or to be used in the performance of the contract, notwithstanding that the bidders may have an opportunity to "bid shop" after award is made. See 51 Comp. Gen., supra.

For the foregoing reasons, we find no basis to question the action proposed to be taken by the contracting officer and, therefore, Hyman's protest must be denied. However, we think that more care should be taken in the preparation of bid solicitations to insure that no useless and unenforceable requirements are imposed on bidders and we are advising the procuring activity.

Deputy 
Comptroller General
of the United States